



Santa Clara Law Review

Volume 17 | Number 1

Article 7

1-1-1977

Book Review [Jury Selection in Criminal Trials: New Techniques and Concepts]

Santa Clara Law Review

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Recommended Citation

Santa Clara Law Review, Book Review, *Book Review [Jury Selection in Criminal Trials: New Techniques and Concepts]*, 17 SANTA CLARA L. REV. 247 (1977).

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BOOK REVIEW

JURY SELECTION IN CRIMINAL TRIALS: NEW TECHNIQUES AND CONCEPTS. By Ann Fagan Ginger. Tiburon, California: Lawpress. 1975. Pp. xii + 728. Looseleaf. \$35.00.

JURY WOMAN. By Mary Timothy. Palo Alto: Emty Press. 1974. Pp. 307. Softbound. \$3.95.

*Reviewed by Alan W. Schefflin**

The position of the jury in the Anglo-American system of justice has always been precarious. Vituperatively attacked and staunchly defended throughout its long history, the jury today is no more secure for its longevity than it was in its infancy eight centuries ago. Faced with a wide and sustained barrage of criticism on several fronts, the jury method of adjudication is once again fighting for its life. The question of jury unanimity, the issue of the proper size for juries, the debate over who may properly voir dire the jury and what they may legitimately ask, the controversy surrounding the right of the jury to nullify the law and acquit in criminal cases on the basis of mercy or conscience, and the concern over proper methods for investigating prospective jurors and selecting jury panels, all mark the terrain in which a major ideological struggle, with enormous practical repercussions, is being waged. A decade of political trials and intensified public interest in the workings of the legal system have further contributed to the presence of the jury on the center stage of popular attention. It is therefore not surprising to see an increase in the number of books and articles exploring the composition and operation of the jury. These two books are illustrative of that trend.

Whether out of reverence, ignorance, or scorn, most Americans have traditionally been content to leave the development of law and the management of the legal system to a small core of highly educated and professionally trained lawyers and judges. Jury service, once respected as a special honor, is now more often viewed as a mere annoyance. The first reaction to a summons for jury services is all too often, "Can I get out of

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it?" and, sadly, a substantial number of citizens have little trouble in doing so. When Congress passed the Jury Selection and Service Act of 1968,¹ it greatly extended the franchise so that hitherto excluded groups suddenly found themselves invited to participate in a legal system that had largely ignored them before. The inclusion in the processes of justice of the widest array of citizens in this nation's history has produced a revitalized interest in the role of the jury in the legal system. A new generation of proponents and antagonists has arisen to once again debate the relative merits of lay participation in the administration of law.

The two books reviewed here support the jury in its traditional form. *Jury Selection in Criminal Trials* is a defense manual for jury advocacy, while *Jury Woman* is a narrative relating the virtues of jury service from the perspective of the juror. Both books are of vital interest to those who are concerned with the role of the jury.

JURY SELECTION IN CRIMINAL TRIALS

Jury Selection in Criminal Trials is a successor volume to *Minimizing Racism in Jury Trials*,² a book exploring Charles Garry's brilliant voir dire in the Huey Newton case. But the new book is broader in scope and offers deeper coverage than its predecessor. Chapters include discussions of the history and function of grand and petit juries, change of venue procedures, challenges to the jury array, investigating the jury panel, exercising peremptory challenges, implementing effective voir dire questioning, and the jury as the conscience of the community. Openly and unashamedly a pro-defense manual for trial strategies, it characterizes recent attempts to weaken the effectiveness of juries (by cutting their size and stripping them of the requirement of unanimity) as political acts designed not merely to streamline the legal process, but more surreptitiously to shift control of the mechanism of justice from the people to the government. Because the jury enshrines self-rule, Professor Ginger considers any weakening of the jury to be an assault on one of the central pillars of democracy; she therefore mounts a massive defense of the jury institution and seeks to provide to defense counsel a manual to aid them in supporting and protecting as strong a jury system as possible.

1. 28 U.S.C. § 1861 *et seq.* (1969).

2. National Lawyers Guild (A. Ginger ed. 1969).

One manifestation of this political bias in favor of juries is the author's extensive use of documents filed in political cases. Indeed, one of the chief virtues and unique distinctions of *Jury Selection in Criminal Trials* is its presentation of material not often found in other texts. Excerpted portions of the following types of material appear throughout the book: personal comments and speeches by leading defense attorneys, briefs, oral arguments, congressional testimony or commentary, affidavits, unreported opinions and judicial orders, motions and memoranda, points and authorities, courtroom testimony, direct examination, petitions for certiorari and prospective jury questionnaires. Each chapter, and each section of each chapter, contains discussion and selective citation to leading authorities and commentaries. But the real highlight is the inclusion of the above listed material which is simply unavailable elsewhere. This material both furthers the author's pro-jury argument and provides useful forms which practitioners may borrow in preparing their own jury challenges or arguments. The presentation of affidavits from experts, for example, presents a lay viewpoint that attorneys might otherwise be apt to overlook. At the same time it provides instruction on how to structure expert testimony and how best to utilize it.³

Extensive illustrations of voir dire techniques reveal the extent to which lawyers have rarified and creatively embellished what was once a brash and unsophisticated procedure. For sheer entertainment value alone, the excerpts from the "masters" of voir dire are a microcosmic illumination of the psychology of the mind. To say that these chapters are entertaining should not be taken in any way as a disparagement of the hard work and creative genius, as well as the serious purpose and humane instincts, that fashioned the author's end product. The voir dire experts we encounter in *Jury Selection* are not trying to entertain us. But the skill with which they have done their job can be appreciated on an aesthetic as well as a practical level.

Perhaps none of the subjects dealt with in this book are as controversial as the use of social scientists and other consultants to aid in jury selection.⁴ The notoriety given to these new

3. A. GINGER, *JURY SELECTION IN CRIMINAL TRIALS* 300, 307, 309-11, 320-26 (1975) [hereinafter cited as GINGER] (illustrations of effective use of expert opinion and testimony).

4. Valuable references not cited in GINGER include: W. BRYAN, JR., *THE CHOSEN ONES* (1971); Bermant, *The Notion of Conspiracy Is Not Tasty to Americans*,

techniques, and their apparent success,⁵ have aroused strong response from experienced trial observers and participants. Several chapters are devoted to this explosive issue. The book presents a careful discussion of how the techniques work, and forms are reprinted for collating and tabulating the massive data which needs to be accumulated and analyzed.

The new science of jury selection is still in its infancy. Yet it has been used in the trials of the Harrisburg 7, the Camden 28, the Gainesville 8, the Wounded Knee defendants, Angela Davis, Mitchell-Stans, Joanne Little, Steven Soliah, and Ellsberg-Russo. In no case was a defendant convicted. All re-

PSYCHOLOGY TODAY, May, 1973 at 60; Brams & Davis, *A Game-Theory Approach to Jury Selection*, TRIAL, Dec., 1976, at 47; D'Agostini & Brown, *Loaded For Acquittal?—Psychiatry in the Jury Selection Process*, 7 U.W.L.A. L. REV. 199 (1975); Moore, Jr., *Redressing the Balance*, TRIAL, Nov.-Dec., 1974, at 29; Robinson, *How Psychology Helped Free Angela*, EBONY, Feb., 1973, at 44; Sage, *Psychology and the Angela Davis Jury*, HUMAN BEHAVIOR, Jan., 1973, at 56; Schulman, et al., *Recipe for a Jury*, PSYCHOLOGY TODAY, May, 1973, at 37; Weider, *Juries on Trial*, HARPER'S WEEKLY, June 28, 1976, at 8 [hereinafter cited as Weider]; Zeisel & Diamond, *The Jury Selection in the Mitchell-Stans Conspiracy Trial*, 1 A.B.F. RES. J. 151 (1976); Christie, *Finding a Friendly Jury*, NEWSWEEK, Aug. 26, 1974, at 49; *Defending Joanne Little*, NEWSWEEK, July 28, 1975, at 34; *Judging Jurors*, TIME, Jan. 28, 1974, at 60; Anspacher, *Angela's Statisticians*, S.F. Chronicle, Feb. 4, 1972, at 6; Smith, *Jury Sleuthing Gets Its Day in Court*, S.F. Chronicle, Oct. 28, 1976, at 4; Wright, *Angela's Psych Squad*, S.F. Examiner & Chronicle, May 27, 1973, § A, at 17; Roger Gould & Renee Gould, *Jury Selection: Pentagon Papers Trial* (unpublished, undated draft) [on file at SANTA CLARA L. REV.].

Special mention should be made of the excellent manual prepared by the National Jury Project and the National Lawyers Guild entitled *THE JURY SYSTEM: NEW METHODS FOR REDUCING PREJUDICE* (Kairys ed. 1975).

5. It is difficult to assess the success of these social science techniques. While it is true that defendants who have availed themselves of scientific consultants have fared very well, other factors may have been the cause. For example, a Department of Justice report evaluated the reasons for acquittals in major political cases and concluded that the results stem in part from the fact that the cases

were tried before juries at least partially composed of people willing to be convinced of government misconduct, or willing to believe the exculpatory motives alleged by the defense. The defense sought, and was able to evoke, the sense that the government used the legal system to legitimize or enforce unpopular policies or decisions.

DEPARTMENT OF JUSTICE, *DISRUPTION IN THE COURTROOM AND THE PUBLICLY CONTROVERSIAL DEFENDANT*, April 18, 1975, at 10 [on file at SANTA CLARA L. REV.].

Interviews with jurors after acquittal verdicts often revealed the view that the government case was very weak. Perhaps social scientists were able to detect jurors who would come to this view. But one commentator has noted that the scientific record is far from unblemished. A woman picked by the defense team in the Soliah case as weak and a follower, was selected as the jury foreperson. The two jurors who voted for convictions and hung the jury in the Harrisburg 7 trial were picked as "good jurors," and the juror who persuaded the 8 jurors who initially voted for conviction in the Mitchell-Stans trial to change their votes to not guilty did not fit into the defense profile as a "good juror." Weider, *supra* note 4, at 9.

sulted in acquittals except the Harrisburg case (which hung 10-2 in favor of acquittal) and the Ellsberg-Russo case (which was dismissed before the case was sent to the jury).⁶ A wide variety of experts, including social psychologists, sociologists, statisticians, computer programmers, body linguists (kinesiologists), behavioral scientists, psychiatrists, hypnotists, astrologers, handwriting analysts, specialists in small group dynamics and media analysts, have lent their special skills to defense efforts to secure the most favorable jury possible. This new technique is a far cry from the folklore, superstition, intuition and lay psychology that lawyers have traditionally used to select jurors.⁷ It seeks to replace intuition with information, superstition with statistics, and folklore with facts.

Although several models exist, the basic procedure for scientific jury selection consists of a three step process. The first step involves obtaining demographic and interview-derived data to ascertain behavioral profiles of the venue site of the trial. Attitude surveys, demographic statistics, voting patterns, political and religious affiliations, occupations, national origins and other significant information is compiled to construct a picture of the potential jury population of that community. Profiles of juror characteristics are then developed and rated as to desirability. From these figures voir dire questions are fashioned to reveal hidden biases or attitudes.

The second phase is in-court observation of the voir dire. Body movements, verbal and nonverbal responses, patterns of dress and speech, attentiveness, suggestibility, deference to authority, ease of communication, and other information is

6. After the dismissal of the Ellsberg case, most members of the jury convened for a session with Roger Gould, a U.C.L.A. Medical School psychiatrist aiding the defense; Martin Levine, Professor of Law at the University of Southern California; and author Peter Schrag. A transcript of the meeting demonstrates substantial sympathy for the defendants and the belief that the government evidence was insufficient. Unfortunately, the transcript has not been published.

7. Under the old learning:

butchers and barbers will be bloodthirsty; carpenters and accountants too meticulous; don't let small businessmen near a robbery trial; get a Jew or other racial minority for sympathy; engineers are coldblooded; avoid intellectuals unless the defense is insanity; no sick, crippled, or otherwise stigmatized persons, since punishment loves company; stay clear of persons having anything to do with education, this being no time to be taught a lesson; beware of the potential juror who has had unpleasant encounters with the law. He may be anti-system and disposed toward you, or having paid his dues he may be determined that you won't avoid yours.

Weider, *supra* note 4, at 8.

compiled on each potential juror and matched with any third party information available about each person. The third step involves the tabulation of this information into a decision about each prospective juror. As the jury panel begins to fill up, different characteristics for the remaining jurors may be sought. Jurors are measured not only against how they might vote for the defendant, but also against how they will interact with each other. The intended result: an acquittal-prone jury.

Sharp criticism has resulted from this marriage of science and the law in the process of jury selection. Arguing that the impartiality of juries is threatened by these procedures, which are ostensibly designed to produce "stacked" or "rigged" juries, some social scientists have urged that drastic measures be taken to curtail further use of these "jury rigging" techniques. Amitai Etzioni, chairman of the Department of Sociology at Columbia University, the most vocal opponent of the new science,⁸ envisions the techniques being used by the government on a far wider scale than individual defendants could match (unless they were wealthy) and the whole trial process being turned from a search for truth into a conflict between computers. He favors reducing the number of peremptory challenges available to each side, an extension of the ban on jury tampering to include out-of-court investigations, and removal of lawyer voir dire so that only the judge may question potential jurors.

Proponents of the new methods of jury selection argue in response that these techniques are necessary to correct the imbalance that already exists between the government and the defendant. According to Howard Moore, Jr., chief defense attorney in the *Angela Davis* case (where these methods were used), "juries are already stacked—against blacks, chicanos, orientals, and the poor."⁹ Moore argues that social scientists are necessary to the defense "not to slant juries, but to correct the prejudice which already exists."¹⁰ Using the *Davis* case as an illustration, Moore cites statistics showing that the chance of Ms. Davis receiving a jury of her ethnic and socio-economic peers in Santa Clara County was minimal. In addition, public surveys demonstrated that one out of three persons held an unfavorable attitude towards Ms. Davis. Under those circum-

8. *Creating An Imbalance*, TRIAL, Nov./Dec., 1974, at 28.

9. Moore, *Redressing the Balance*, TRIAL, Nov./Dec., 1974, at 29.

10. *Id.*

stances, the defense was not looking for an acquittal-oriented jury as much as it was looking for "jurors whose attitudes and personality characteristics indicated openness and an ability to listen to both sides and arrive at a rational decision based upon the evidence or lack of evidence."¹¹

Ginger accepts the argument that scientific jury selection is necessary to protect against the greater resources available to the government.¹² She argues that the government has already accumulated the same kind of information which the defense is now seeking to compile.¹³ Without the new jury selection methodology, the government's advantage would be nearly insuperable. Nevertheless, she cautions that juror privacy must be respected as fully as possible and notes that the type of information which defense strategists seek is more objective than personal.

The real threat, however, is ignored by Ginger. To the extent that the new techniques continue to arouse displeasure, especially among judicial and government officials, their very success may lead to the downfall of the jury. Especially at a time when the jury system is undergoing careful scrutiny and extensive revision, the argument that these new methods produce stacked and unfair juries may be precisely the ammunition necessary for a call for the jury's total abolition. After all, if the defense can pick a biased jury, the whole point of trial by jury is eliminated;¹⁴ cases would depend more upon persons than proof. The rules of evidence would be less important than the principles of personality analysis. The trial would be an anti-climatic afterthought to the drama of jury selection.¹⁵ Proposals for elimination of the jury already exist in the legal literature¹⁶ and the new liaison between science and lawyers in selecting defense-oriented jurors could well add further fuel to those simmering fires of discontent. The failure of Ginger to

11. *Id.* at 35.

12. GINGER, *supra* note 3, at 332-34.

13. *Id.* at 364.

14. See Morgan, Book Review, 49 HARV. L. REV. 1387 (1936).

15. The story is told of an English barrister and an American trial lawyer who were discussing their respective court proceedings. The American asked the barrister when a trial began under the English system. "When the jury is accepted by counsel and sworn to try the issues," he replied. "Hell," said the American, "in the United States the trial is over by that time."

Atkins, *Jury Voir Dire by Counsel—Let's Preserve It*, 31 INS. COUNSEL J. 689 (1964).

16. See, e.g., Kessler, *The Crime Crisis and Proposed Procedural Reform*, 5 LOY. L.A.L. REV. 1, 22-32 (1972).

recognize this threat is a serious defect, which is especially sad since the very thrust of her pro-techniques argument could, ironically, lead to the destruction of the very institution she is trying to preserve.

Other troublesome aspects of *Jury Selection in Criminal Trials* might also be mentioned. I have already pointed out the very heavy pro-defense bias of the book. While this bias ignites the book with passion and drive, making it alive and scintillating to read, it also leaves the reader with the impression that much is missing. It soon becomes clear that the absence of balance and extended scholarship hurts the book. The reader will not find all the necessary arguments, nor even all the law, in it. Much that would be essential to present a successful jury argument will have to be sought elsewhere. Most topics are at least superficially touched upon with supporting citation, but more should be expected and more could have been delivered.¹⁷ Perhaps these deficiencies are the inevitable by-product of the book's exciting, pro-jury vision.

While most of the chapters give a basic indication of the jury arguments being considered, such is not the case with the chapter on jury nullification. The right to have the jury instructed that it may acquit the defendant for reasons of conscience or mercy—even though the defendant may be technically guilty under the facts and the judge's instructions on the law—has been a mainstay of virtually every political trial argued in the last decade. Defense lawyers have labored, largely unsuccessfully, to prevail on this issue. The superficial presentation given in *Jury Selection in Criminal Trials* to this important argument cannot adequately inform concerned counsel about its meaning. The reader who is not already familiar with the nullification argument is apt to be confused, and perhaps even misinformed, after reading the book's scanty discussion of this issue.¹⁸ Because nullification is a central, indeed vital, concept for the political meaning of the jury to Ginger, it is tragic that she did not give it the treatment it deserves.

17. However, help is on the way. Professor Jon Van Dyke has written a book which supplies much of this information. His book serves as a fine companion volume to Professor Ginger's work. J. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* (1977).

18. GINGER, *supra* note 3, at 674. Fortunately, there are law review articles which may be consulted for guidance. Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972); Schefflin & Van Dyke, *Jury Nullification: The Contours of a Current Controversy*, to be published in 1977.

More than any other issue in *Jury Selection in Criminal Trials*, nullification most closely identifies the jury with the people's sovereignty; the people's power over law. One would expect this chapter to be the book's best rather than its worst.

This criticism is symptomatic of the design of *Jury Selection in Criminal Trials*. Adopting the posture of a how-to-do-it manual for defense lawyers, and figuring that the way to do it is by following what others have done before, the book often opts for reproduction of a form or document, without more, where it might have been better to articulate the competing arguments. In the chapter on jury nullification, for instance, the reader is not given sufficient historical background from which the genesis of the nullification argument is derived. Nor is the reader presented with the major arguments supporting the right, the reasoning that courts and commentators have used to refuse it, and the answers to these arguments that have been raised by supporters. In short, while nullification is still an ongoing debate,¹⁹ the reader is treated to no more than a skimpy presentation of one side. An objective evaluation under such circumstances by a concerned reader with an open mind would be simply impossible. Throughout much of the book, and especially in the last chapter, the reader has to know much already in order to appreciate what is being offered.

In spite of its defects, *Jury Selection in Criminal Trials* is a fascinating book. What it lacks in scholarship it more than makes up for in dedication. The jury has always inspired wonder and excitement, even in those critics bent on terminating its existence or tarnishing its image. Jury stories are good stories and lawyers and laypersons alike delight in sharing them with others. But *Jury Selection in Criminal Trials* is intriguing not simply because it concerns a fascinating subject. Many words have been written about juries, about how they function, and about those who sit on them, without being interesting, let alone fascinating. Ann Ginger's book is compelling because it is a human book, a rewarding chronicle of the energies, ideas, talents and turmoils of many men and women who labored, lovingly, to make the jury dream a routine practice. Their dedication to the law as the people's tool for self-rule, and to the jury as the only institution capable of guaranteeing that all of the people, and not just a select elite few, are counted, brought before the legal forum and the public arena the central ques-

19. See *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).

tions of democracy, asking a nation to respect its heritage, obey its laws and be true to its ideals. Such dedication seeks to make the vision of the jury as expressed by Justice White a reality:

The guarantees of the jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of a single judge, he was to have it. Beyond this, the jury trial provision in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Government in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.²⁰

JURY WOMAN

Books about the jury written by former jurors are often the most enjoyable, and *Jury Woman* by Mary Timothy, the jury foreperson in the *Angela Davis* trial, is no exception. It is filled with enough warmth and confusion, anger and concern, humor and judgment to be both entertaining and enlightening. Who can fail to be amused at her description of the prospective

20. *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968).

jurors in the assembly room listening to instructions over a closed circuit television set: "This was really a strange scene: a room full of people pledging to uphold the law of the land and the rules of the court—to a TV set."²¹ And who cannot feel her concern when she discovered that other jurors shared her experience of having difficulty with their home telephones and suspecting that their lines had been tapped.²² An FBI visit to her son's apartment on the pretext of having information that a draft evader was living there, coupled with a thorough search of the premises, produced in her mind the reaction that "they were sending me a message. They were telling me that my children were vulnerable."²³

We can sympathize with Mary Timothy's uneasiness about whether she could go to a peace march to demonstrate against the bombing of North Vietnam while sitting as a juror. She went.²⁴ And we can certainly share some of her exhilaration at finally being able to communicate her impressions of the trial to someone else:

We all wanted to talk. We were the only people in the world who hadn't been able to discuss the case or even mention it casually. Now we finally were given a chance to start saying some of the things that we had kept bottled up for all these weeks.²⁵

Mary Timothy's description of her own involvement in the process that eventually led to Angela Davis's acquittal highlights one often overlooked virtue of jury service. As explained by a former juror writing in the *Los Angeles Times* several years ago:

Jury service has changed me in another way; I've learned to know myself better. It starts the first time you go into a courtroom and the voir dire starts.

You become aware of your own prejudices when you're asked if you're prejudiced against people who drink.

21. M. TIMOTHY, *JURY WOMAN* 15 (1974) [hereinafter cited as TIMOTHY].

22. *Id.* at 50.

23. *Id.* at 122. Jurors in other cases have had similar suspicions of improper governmental interference with the sanctity of the jury. In the Chicago Conspiracy Trial, a juror believed to be pro-defense received a threatening letter allegedly sent by the Black Panthers. The letter was read to her by the judge. She asked to be excused and was replaced by an alternate who other jurors felt was a government agent. See SCHULTZ, *MOTION WILL BE DENIED: A REPORT ON THE CHICAGO CONSPIRACY TRIAL* 328-342 (1972).

24. TIMOTHY, *supra* note 21, at 149-50.

25. *Id.* at 247.

Against Arabs. Against police officers. Against people who aren't citizens. Against people whose life-style is different from yours. Against whatever.²⁶

Timothy describes her own shock at discovering that she had not been paying close enough attention to the presentation of the case at one point:

The witness had carelessly stated something that was obviously in error and I hadn't even noticed! I was going to have to get to work. I couldn't just sit there and listen politely to the stories of the witnesses. I was going to have to question and analyze and worry about each statement.²⁷

She could no longer take the process for granted. She had become involved. Learning about both herself and the law, jury service turned Mary Timothy from a complacent citizen into a concerned citizen.

One measure of her increased involvement in the trial process is the unique role she played in the acquittal verdict. As the time approached for the jury to retire and deliberate, she realized that she had no real idea of how those deliberations should take place. A trip to the local library produced several books written by lawyers or judges about the jury but none from the perspective of *how* juries deliberated. None had the special insight available only to those who had been through the process themselves. Finally, she found Godfrey Lehman's *What You Need to Know for Jury Duty*, a book written by a former juror about the step by step aspects of jury service. Containing extensive discussion of the process of jury deliberations, it provided advice which was to prove instrumental in the *Davis* case.

Lehman, departing from the usual practice, urges that the jurors *not* take an initial vote to determine where they stand. Lehman argues that the initial vote is destructive because if it is unanimous, the jury will forego the opportunity to discuss the case, and if it is divided, the jurors will feel committed to defend their vote. In both instances the opportunity to discuss the case with an open mind is lost.²⁸

26. Murphy, *Six Weeks That Shook Her World*, L.A. Times, July 9, 1972, § E at 1, 17 [hereinafter cited as Murphy].

27. TIMOTHY, *supra* note 21, at 113.

28. Lehman argues:

Never start by taking a ballot on the verdict! You might believe that an immediate ballot will teach you how the jury stands, and that, if you are

Timothy was impressed with this advice and urged it upon her fellow jurors. She explained to them that taking an initial vote might "tend to cause people to argue rather than discuss; it could polarize people and possibly result in a hung jury."²⁹ Timothy credits the advice given by Lehman with permitting a free flow of ideas and opinions in the *Davis* deliberations.

A further piece of information about those deliberations is instructive for lawyers. Timothy realized that the order of deliberations could affect their outcome. One juror, leaning to-

unanimous, there's no need for any discussion at all, and you've saved all that time.

The dangers are many. When you ask for a ballot as the first order of business, one or more jurors may feel pressured to cast his vote despite serious doubts. If it is unanimous and deliberations are closed immediately, these doubts are never resolved. Such a juror may be too timid to ask for a reconsideration.

Often a juror who has committed himself, even tentatively, may find it difficult to switch in the mistaken idea that to change his mind implies weakness, vacillation, or even stupidity. Further, a divided vote imposes upon the minority a three-horned dilemma: the greater burden of convincing the majority, rarely accomplished; the embarrassment of switching; or the potential disgrace of forcing a hung jury.

Still more important, as soon as you take your first ballot you divide yourselves into two opposing camps and introduce the irrelevance of antagonism; you are drawn into defending your respective positions rather than being left free to consider the evidence and testimony objectively.

But the most important reason for not voting at the start is that you have not reviewed the case or the evidence. While you may have been doing a lot of thinking about the case, you probably have not thought of everything. When you share your thoughts with the other jurors, almost undoubtedly you will be reminded of significant evidence you had forgotten and which may change your entire opinion. This will be true of almost every juror, whose memory will have played varying tricks on his recollections of the trial.

Many juries begin by asking each member around the table to express a preliminary opinion and to give his reasons. This has the identical effect of voting secretly, except it is much stronger. Each juror is committing himself firmly and publicly to a position without having reviewed the total evidence.

And when you've gone around the table, what do you do then? One juror has presented one set of reasons for voting "guilty" or "liable"; a second has supported his "not guilty" or "not liable" stand for an unrelated set of reasons. You are now enmeshed in a controversy not connected with the evidence because, if you are to reach a verdict, one or more jurors must be willing to switch from the position he has taken.

Thus it is important that none of your opening actions force any juror to a commitment of any kind. The foreman should make this clear immediately, and no juror should express, even to the fellow next to him, his position on what the verdict should be, no matter how strongly he may feel.

LEHMAN, WHAT YOU NEED TO KNOW FOR JURY DUTY 40-41 (1968).

29. TIMOTHY, *supra* note 21, at 240.

wards conviction, wanted to start with the kidnap-murder charges. Timothy objected, preferring to begin with the conspiracy charge. She felt that if the kidnap-murder charges opened the discussion, substantial testimony about "the guns and the bullets, and all the testimony of the police witnesses and the hostages would have to be considered"³⁰ and this would inure to the detriment of Ms. Davis. So the jury began with the conspiracy charge and quickly disposed of it; the rest of the charges fell for lack of support. Had the jurors begun their deliberations with the kidnap-murder charges, the ultimate verdict might have been quite different. Although presented to the reader simply as a factual description of jury deliberation, this information is of great significance to attorneys.

There are other lessons attorneys may learn from *Jury Woman*. For example, when the prosecution witnesses described how many "rounds" of ammunition they discovered, the defense never clarified to the jury that a "round" is a single bullet. Timothy notes that when this point was discussed in the jury room, many of the jurors thought that a "round" of ammunition was a large quantity and not just a single bullet.³¹ The defense had unknowingly allowed the prosecution to create an image contrary to fact, thereby strengthening its case.

The major thrust of Timothy's book is that jurors do not fully know their proper role so they seek guidance from experienced courtroom participants. The attorney who carefully tries to ease the confusion of the jurors by pointing out aids to them in performing a function they do not fully comprehend will win their support. But the attorney who leaves the jury to struggle with its own conception of what it is doing is inviting his or her adversary to obtain an advantage by providing this guidance.

What separates *Jury Woman* from other books written by former jurors is its plea for a Juror's Bill of Rights. The problem, according to Timothy, is that jurors do not know what is expected of them. Although jurors are told their duties, they are not told their rights. Could they take notes? One of them did and concluded that it was permissible because no objection was made.³² But no one had encouraged or authorized them to do so. Could they ask questions during the trial? When

30. *Id.* at 241.

31. *Id.* at 97.

32. *Id.* at 143.

one juror tried to do so he was rebuked by the judge.³³ According to Timothy:

We were not informed as to what actions on our part would lead to our dismissal from the jury, or cause a mistrial. Not knowing the limits put a lot of pressures on us. Everyone else in the courtroom knew his or her job. They knew what they were doing—everyone except us. We were overwhelmed. We tried to conform and adjust and be perfect jurors, perfect people.³⁴

Timothy proposes a Bill of Rights for Jurors as a solution.³⁵ Jurors, she believes, have a right to be fully informed of the rules before the trial begins. They have the right to be told whether or not they may ask questions, take notes, request a review of testimony, ignore prejudicial attitudes or opinions or rulings by the judge, or engage in whatever form of behavior he or she desires outside the courtroom. Such information, along with a statement of jury duties, should be available in a jury handbook.

Timothy's plea for jurors also includes the right to adequate financial compensation and for protection from threats in high tension cases. More controversial is Timothy's proposal that jurors have a right to have "members of minorities included on the jury."³⁶ In the *Angela Davis* case, the jury was "all-white, middle-class, middle-income"³⁷ and this hampered dealing with the special problems of minority defendants. Timothy criticizes the prosecution practice of removing minority jurors with peremptory challenges, considering this a violation of the civil rights of the jury. Our legal system has not yet reached the point where it is ready to recognize the legal status of the jury as a plaintiff, but if the concept of legal standing for trees³⁸ can receive a sympathetic ear on the Supreme Court,³⁹ perhaps the day will not be too far off when the jury will be allowed to sue on its own behalf.

One such suit might be based on Timothy's claim that jurors are entitled, as fully as other citizens, to a right of pri-

33. *Id.*

34. *Id.*

35. *Id.* at 301-07.

36. *Id.* at 304.

37. *Id.*

38. Stone, *Should Trees Have Standing?—Toward Legal Rights For Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

39. *Sierra Club v. Morton*, 405 U.S. 727, 742 (1971) (Douglas, J., dissenting opinion).

vacy.⁴⁰ For example, Timothy urges that each juror be voir dired in private. According to Timothy, there would be a "double advantage: the personal privacy of the individual would be protected and the juror being questioned would feel freer to disclose any problems he or she might have."⁴¹ Such voir dire should be conducted by attorneys and not solely by the judge. Timothy believes that attorneys are more successful than judges in detecting and disclosing subtle biases.⁴² An illustration during the voir dire in the *Davis* case makes her point. One of the defense counsel, while questioning a prospective juror, received a response that it would be difficult for that juror to be objective in judging a defendant with communist-leanings. Defense counsel requested removal for cause, but the judge took over the questioning "and by rephrasing it made it possible for [the prospective juror] to reply that yes, indeed, he could be a fair juror. So he was left on the jury."⁴³

The other aspect of privacy greatly in need of protection, according to Timothy, is the personal lives of the jurors. "Jurors," she says, "have a right to be free from investigation of their private lives."⁴⁴ Pointing to the trend to hire psycholo-

40. See Maxwell, *The Case of the Rebellious Juror*, 56 A.B.A.J. 838 (1970) (winner of the 1970 Ross essay competition).

41. TIMOTHY, *supra* note 21, at 306.

42. For an excellent article on this subject see Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOKLYN L. REV. 290 (1972).

43. TIMOTHY, *supra* note 21, at 43.

44. *Id.* at 306. Present law permits investigation of jurors by government and defense counsel provided that such investigation does not invade the privacy of the juror, involve jury tampering or constitute an obstruction of justice. See Annot., 20 A.L.R. Fed. 731 (1974). Without a showing of intimidation or an attempt to influence the juror in a specific case, a violation of the law would be difficult to prove. Mere information gathering is perfectly legal. The right of the juror to privacy is no greater than the right of any citizen to privacy and courts have permitted extensive investigations of prospective jurors. See Okun, *Investigation of Jurors by Counsel: Its Impact on the Decisional Process*, 56 GEO. L.J. 839 (1968); Editor's Page, 57 GEO. L.J. 461 (1969). In many large cities, private detective firms routinely investigate potential jurors and sell the information to major law firms. See Belli, *Forward to W. BRYAN, THE CHOSEN ONES* at x (1971) (analogizing these jury services to "handicapping" guides at racetracks, aiding the major law firms in predicting how "a juror will 'run.'").

Okun delineates the power of the jury to nullify the law as an important and special function which should be exercised when the jury adequately reflects a cross-section of the community. Once the jury represents this cross-section, their overriding of the legislative will more closely mirrors community sentiment. Okun, *supra* at 844. The practice of obtaining pre-trial information on jurors interferes with the obtaining of representative juries, in Okun's opinion, because such information is used by counsel to select jurors biased in their favor rather than jurors reflecting the composition of the community. Okun, *supra* at 878. Okun, therefore, favors a reduction in the level of permissible data-gathering on potential or actual jurors. Unfortunately, he

gists, sociologists, statisticians and other defense consultants, Timothy fears that the apparent success of these new techniques will hurt the image of the jury and threaten the citizens who compose it. In a highly significant passage she observes:

The government, losing so many of these politically important cases, is bound to blame the juries rather than the inadequacy of its own cases and so will be forced to expand the already formidable investigations of prospective jurors.

Historically, government agencies move slowly; therefore, these investigations would have to be done, not immediately before each trial, but on all citizens on the jury lists, so as to be properly prepared.

Thus, in an effort towards more sophisticated jury selecting, dossiers [sic] would need to be compiled on all citizens and kept up to date.

And the jury system, devised as a fortification of democracy, would lead us to a police state!⁴⁵

CONCLUSION

Mary Timothy's position stands in direct contrast to that of Professor Ginger. Both are ardent supporters of the jury system, yet each draws different conclusions about the value and meaning of intensive social science input into the jury selection process. Other issues often reveal divisions between those who support the jury system and those who do not, but here is an issue that divides jury *supporters*. It is, for this very reason, perhaps the most significant concern about the jury today. Professor Ginger, an academic, and Mary Timothy, a juror, have drawn the lines of confrontation. Timothy's challenge is that what may be good for the defense will be better for the government, and Ginger's response is that what is

does not detail how he would limit such investigations.

Another solution to the increasing investigation of jurors is suggested in Note, *The Constitutional Need for Discovery of Pre-Voir Dire Juror Studies*, 49 S. CAL. L. REV. 597 (1976). The author proposes to expand discovery rules to permit the government and the defense in criminal cases to obtain the information on jurors each has compiled. The discovery order would exclude work-product based upon interpretation or evaluation of the information. It would only permit discovery of the raw data. Present law generally does not permit discovery of jury investigation material.

Attempting to protect the defendant's constitutional right in criminal cases to an "impartial jury" and the right of potential jurors to be free from intrusive and extensive incursions into their private lives will require some deft balancing by the courts. The value of Mary Timothy's articulation of a Juror's Bill of Rights is that it encourages us to start thinking about this problem now.

45. TIMOTHY, *supra* note 21, at 307.

essential for the defense must be protected from the government. Ginger is willing to risk the possibility of increased governmental data gathering in order to protect political defendants from unfair or unjust criminal charges; the immediate threat outweighs the possible potential one. Both authors fear that the jury will become, as it has been before upon occasion, a subservient tool for an overly powerful government. Timothy is afraid that the government will be able to control juries through excess information about jurors, and Ginger fears that government will control juries through insufficient information available to the defense.

Whether either is right, and if so, which one, awaits the judgment of the future. Social science expertise in the jury selection process for the present remains an expensive luxury that few can afford. Yet it has produced impressive results, if acquittals in cases as disparate as the Camden 28 and the Stans-Mitchell trial are any guide.⁴⁶ Hailed by some as an essential tool to weed out prejudice, and condemned by others as a sure method to secure it, contemporary jury selection techniques will most certainly become even more refined. As an exciting frontier for the social sciences, current indications point to increased involvement by sociologists and psychologists in the legal process. When the novelty wears off, however, we may very well conclude that all the graphs, charts, statistics and analyses were scarcely an improvement on the lawyer's traditional guide—the hunch.⁴⁷ When that happens, we may return to the fundamental point made time and time again by

46. But see note 5, *supra* (on the difficulty of crediting acquittals to social science jury selection).

47. Some contemporary evidence supports this view. In a study conducted by social psychologist Shari Seidman Diamond and jury expert Hans Zeisel, both defense lawyers and prosecutors proved highly successful in eliminating unsympathetic jurors. Horn, *Relax: Lawyers Have Done It for Years*, *PSYCHOLOGY TODAY*, May, 1975, at 63. The study compared juries selected by counsel after peremptory challenges with experimental juries randomly selected without challenges. The former acquitted in half the cases, whereas the latter convicted in *all* cases. The study did not compare juries selected with aid from social scientists against juries selected by attorneys without such aid, however.

Richard Christie, one of the leaders in the application of social science techniques to jury selection, has observed "There isn't a sociologist or psychologist around who can beat a good trial lawyer at jury selection. The trouble is, there aren't that many good trial lawyers around." Christie, *Finding a Friendly Jury*, *NEWSWEEK*, Aug. 26, 1974, at 49.

Michael Saks has suggested that if lawyers wanted to have a greater influence over the outcome of trials, they would be better off using social scientists to "help build and structure the evidence to be presented" because "if there is anything social psychologists know about, it is the process of persuasion" Saks, *Social Scientists Can't Rig Juries*, *PSYCHOLOGY TODAY*, Jan., 1976, at 48, 57.

jurors: jury service changes a person. As one juror stated, "Jury duty has given me a new respect for the law For the most part, jurors become almost fanatic in trying to be fair—I think it's the aura of the courtroom."⁴⁸ In Mary Timothy's own words, "Yet we who have served on juries have found it to be an experience which often makes us become strong defenders of this sytem of jurisprudence which allows a citizen to sit in judgment."⁴⁹

The jury reflects the law's basic trust in people. That's the message which comes across clearly in these two books. It may be an imprecise method to make vital decisions. It may make mistakes. It may cause some confusion and uncertainty. It may be unpredictable. But it is a human institution. The support for the jury expressed by these two authors is not misplaced. Their books contribute useful knowledge about the workings of the jury and treat that august institution with awe and respect. At the close of the *Angela Davis* trial, after the jury returned its verdict, the judge thanked the jury and read to them a passage from G.K. Chesterton's *Tremendous Trifles*. The passage sums up the special attraction of the jury expressed in these two books:

Our civilisation has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men.

If it wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things I felt in the jury box. When it wants a library catalogued or the solar system discovered, or any trifle of that kind, it uses its specialists. But when it wishes anything done that is really serious, it collects twelve of the ordinary men standing about. The same thing was done, if I remember right, by the founder of Christianity.⁵⁰

48. Murphy, *supra* note 26, § E, at 1.

49. TIMOTHY, *supra* note 21, at 302.

50. *Id.* at 292.

